

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Application of Pacific Gas and Electric Company
for Approval of the Retirement of Diablo Canyon
Power Plant, Implementation of the Joint Proposal,
And Recovery of Associated Costs Through
Proposed Ratemaking Mechanisms (U39E).

Application 16-08-006
(Filed August 11, 2016)

**RESPONSE OF FRIENDS OF THE EARTH
IN OPPOSITION TO THE MOTION OF ENVIRONMENTAL PROGRESS
TO SUSPEND THESE PROCEEDINGS**

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Dated: September 30, 2016

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Pursuant to Rule 11.1(e) of the Commission’s Rules of Practice and Procedure, Friends of the Earth (“FOE”) hereby responds to the motion by Environmental Progress to suspend these proceedings. As a Constitutional agency, this Commission is required by law to exercise jurisdiction here. The motion in any event does not make the compelling showing that would be required to justify such extraordinary relief. Accordingly, FOE urges the Assigned Commissioner and the Assigned Administrative Law Judge to promptly deny the motion.

I. DESCRIPTION OF THE MOTION TO SUSPEND

Environmental Progress asks the Commission to “suspend” indefinitely its consideration of the Application by Pacific Gas and Electric Company (“PG&E”) in this docket. Although the motion uses the term “suspend,” in effect it appears to be a plea to the California Legislature to step in and take over this case.

As grounds for this request, Environmental Progress offers two lines of argument. First, Environmental Progress cites a statement attributed to Commission President Michael Picker in a

November 2015 newspaper article, in which President Picker is reported to have said, in connection with the Diablo Canyon Power Plant, “We have, in general, a wealth of choices, so no one plant is absolutely essential.” (Motion to Suspend, p. 4.)

Second, Environmental Progress describes alleged improper ex parte communications and email exchanges by the involved utilities in the San Onofre Nuclear Generating Station (“SONGS”) proceedings and in prior PG&E cases. Environmental Progress argues that these and other controversies have “tainted” the Commission (*id.*, p. 3) and created a “crisis of legitimacy” (*id.*, p. 17). The motion asks that the Commission defer action in this case and instead allow the California Legislature, through an “alternative process,” to decide all issues related to closure vs. continued operation of the Diablo Canyon facility. (*Id.*, pp. 17-18.)

II. FOE’S ARGUMENT IN OPPOSITION TO THE MOTION TO SUSPEND

As described in its motion to intervene, FOE is signatory to the Joint Proposal that forms the basis for PG&E’s Application in this case. FOE fully supports the proposal to close the Diablo Canyon facility in an orderly, planned manner at the end of its current operating licenses in 2024 and 2025, and to replace it with greenhouse gas free resources. Indeed, virtually every party *except* Environmental Progress appears to support at least some aspects of this plan. Environmental Progress, of course, has a right to be heard, but it has no right to shut down these proceedings. Doing so is not a legally permissible course of action for this Commission.

A. AS AN AGENCY CREATED BY THE CALIFORNIA CONSTITUTION, THE COMMISSION HAS A LEGAL OBLIGATION TO CONSIDER THE JOINT PROPOSAL, AND CANNOT ABDICATE THIS RESPONSIBILITY

The motion to suspend appears to be premised on the notion that this Commission can simply elect, as a matter of its own choice, to *not* consider a major proposal to close California’s remaining nuclear power plant, replace it with greenhouse gas free resources, and resolve related

issues of cost responsibility and cost allocation among utility ratepayers. This premise, however, ignores the law of California.

This Commission was created, not by an act of the Legislature, but by the California Constitution of 1911. The relevant provisions are found in Article 12 of the Constitution. To be sure, Article 12 authorizes the Legislature to enact laws expanding, or limiting, the powers of the Commission, and giving substantive policy direction to the Commission in support of its mission. (Article 12, Sec. 5.) The Legislature, for its part, delegated its rate-setting authority over PG&E to this Commission when it enacted Public Utilities Code Sections 201, et seq. In these circumstances, the Commission is obligated as a matter of law to consider and decide PG&E's request in this docket. The Commission has no discretion to unilaterally decline to exercise this responsibility. Were the Commission to decline to act, as urged by Environmental Progress, this would constitute a failure to proceed in the manner required by law, which would be legal error under Public Utilities Code Section 1757(a)(2).

The motion by Environmental Progress overlooks the foundational legal status of the Commission as a constitutional agency and its obligations under the Public Utilities Code. Environmental Progress appears to assume, without reference to the Constitution or the Public Utilities Code, that the Commission can simply elect, as a matter of discretion, to decline to act or to refer this case over to the California Legislature for disposition there.

To be sure, the Legislature if it chose could consider and enact legislation disposing of the issues in a case of this type, and the Governor, in turn, would have the responsibility to decide whether to sign or to veto such a bill. There is nothing, in other words, to prevent the Legislature from seizing control of an issue related to public utility regulation, and deciding via the legislative process how it should be resolved.

But Environmental Progress has cited no law or precedent for the proposition that the Commission has the authority to refer a major issue of public utility regulation to the Legislature in Sacramento for resolution there. FOE respectfully submits that this would be an unlawful abdication of the Commission's duties under the Constitution and the Public Utilities Code.

B. ENVIRONMENTAL PROGRESS HAS NOT SATISFIED THE REQUIREMENTS FOR RECUSAL BY ANY ONE COMMISSIONER, MUCH LESS THE FULL COMMISSION

The established legal standard for disqualification of a Commissioner in a ratesetting proceeding such as this is whether there is "clear and convincing" evidence that a Commissioner "has an unalterably closed mind on matters critical to the disposition of the proceeding." *See, e.g.*, Decision ("D.") 12-04-018, pp. 27-28.

Environmental Progress has failed to satisfy this legal standard for recusal. The motion to suspend describes only one remark attributed to Commission President Michael Picker, in which he is reported to have said, in reference to the prospect that the Diablo Canyon plant might be closed, "no one plant is absolutely essential." This brief remark by the Commission President is merely an observation of reality. It does not even remotely suggest bias of the type that would disqualify President Picker from participating in this case. Commissioners are duty bound to have knowledge of the subject matter. To state the obvious is not bias.

There is no legal standard that would warrant recusal by President Picker based on this weak claim by Environmental Progress.¹

In moving to suspend this entire proceeding, moreover, Environmental Progress in effect is demanding that all five Commissioners be disqualified. This is utterly without basis.

¹ On September 29, 2016, Governor Brown signed legislation (SB 215) that among other things will change the standard for recusal by a Commissioner, by amending Section 309.6 of the Public Utilities Code. The new standard will take effect next year. But even if the new standard were applied in this case, it is clear that President Picker has no reason to recuse himself.

C. ENVIRONMENTAL PROGRESS WILL BE AFFORDED ITS RIGHT TO BE HEARD IN THIS CASE

It is clear that Environmental Progress wishes to contest the proposal to close the Diablo Canyon facility at the end of its current operating licenses, and to replace it with greenhouse gas free resources. Environmental Progress prefers to keep Diablo Canyon operating indefinitely.

While FOE firmly believes that the Joint Proposal represents the best path forward for California and for PG&E's customers, FOE recognizes that Environmental Progress has a right to be heard on these issues. The evidentiary hearings in this proceeding will afford Environmental Progress its right to be heard. Suspension of the proceedings plainly is not warranted or even legally permissible.

III CONCLUSION

For the foregoing reasons, FOE respectfully asks that the Commission promptly deny the motion to suspend filed by Environmental Progress.

Respectfully submitted,

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